BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VEDA M. ODERO Claimant VS. **SANDPIPER BAY HEALTH & RETIREMENT** Respondent AND **TRAVELERS INDEMNITY** Insurance Carrier	)	
ANDOVER HEALTH CARE CENTER, INC. Respondent AND **OLD REPUBLIC INS. CO.** Insurance Carrier	)	Docket No. 1,032,650 Docket No. 1,032,501

ORDER

Respondent, Sandpiper Bay Health & Retirement (Sandpiper) and its insurance carrier requested review of the June 1, 2009 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on September 25, 2009 in Wichita, Kansas.

APPEARANCES

E.L. Lee Kinch, of Wichita, Kansas, appeared for the claimant. Ali Marchant, of Wichita, Kansas, appeared for Sandpiper and its Insurance Carrier. David Mosh, of Kansas City, Missouri appeared for Andover Health Care Center and its insurance carrier (Andover).

RECORD AND STIPULATIONS

The Board has reviewed the record and while the stipulations contained in the Award are largely accurate, some corrections are warranted. At oral arguments claimant conceded that claimant's average weekly wage is no longer an issue in Docket No. 1,032,650. Claimant announced that respondent's recitation of $456.86 as the average weekly wage for that docketed claim is correct and no longer disputed. And both claimant and Sandpiper confirmed that a total of $7,176.68 was paid in temporary total disability benefits in Docket No. 1,032,650. This computes to 23.56 weeks of temporary total disability. In addition, the dates of accident listed in the stipulations within the Award are inaccurate and will be corrected below.

ISSUES

This case involves two separate claims that were consolidated for trial. Claimant performed essentially the same work for two separate employers over successive periods of time. There is no dispute that she injured her left knee in the first accident (Docket No. 1,032,650, sometimes referred to as the "October 2005 accident"). There is also no dispute that claimant experienced a subsequent event in November 2006 when she attempted to stand and got her leg wrapped up in a phone cord. This second event encompasses Docket No. 1,032,501 (hereinafter sometimes referred to as the "November 2006 accident"). In April 2008, claimant had a total knee replacement at the direction of Dr. Cusick.

Following the Regular Hearing, the ALJ concluded that claimant was injured in the October 2005 accident but that "[a]ny injuries she may have received on November 2006, while working for Andover Health Care, are simply a temporary aggravation."[1] In doing so, he expressly relied upon the testimony of Dr. Jansson. Thus, all benefits and responsibility were assessed against Sandpiper and its carrier. The ALJ assigned a 62.50 percent permanent partial impairment[2] to the left knee.[3]

Sandpiper has appealed this Award taking issue with the ALJ's finding with respect to the nature and extent of impairment attributable to the October 2005 accident. Sandpiper contends that while claimant did injure her left knee in October 2005, her permanent impairment is limited to 2 percent impairment of the knee, as assigned by Dr.

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[1] ALJ Award (June 1, 2009) at 7.

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

[3] The ALJ found claimant's average weekly wage in Docket No. 1,032,650 to be $481.65. However, based upon the parties stipulation at oral argument, claimant's average weekly wage for this claim is $456.86 which yields a compensation rate of $304.59.

Prohaska. Sandpiper acknowledges responsibility for that 2 percent impairment as well as any temporary total disability (TTD) benefits and medical expenses directly associated with that injury. But as of November 4, 2006, Sandpiper contends that claimant suffered a second intervening accident while employed by Andover which necessitated medical treatment and ultimately a knee replacement. Sandpiper argues that this accident was the cause for further treatment including the knee replacement. Thus, Andover should be held responsible for those costs and any resulting permanency.

Although Andover disputes that claimant needed the knee replacement surgery it defends the ALJ's causation conclusion in the Award and asks that it be affirmed in all respects. Like the ALJ, Andover relies upon Dr. Jansson who testified that the damage to claimant's knee in the November 2006 accident is all attributable to the October 2005 accident. Thus, the claimant's need for medical treatment is the natural and probable result of claimant's earlier accident and not the result of the November 2006 accident.

Andover argues that the Award should be affirmed as it contends the claimant's knee condition is the natural and probable consequence of the October 2005 accident at Sandpiper and any permanent partial impairment should be paid for by Sandpiper and its insurance carrier. Andover also contends that the November 2006 event did not constitute an accidental injury arising out of and in the course of claimant's employment. And even if it constituted an accident, the accident caused nothing more than a temporary aggravation as indicated by Dr. Prohaska.

Both Sandpiper and claimant argued that whatever the resulting impairment that is found, that the responsibility for that impairment should be apportioned, consistent with the testimony of the physicians, specifically 60 percent to the first accident and 40 percent to the second accident. And Andover specifically argued that the ultimate impairment rating on claimant's knee should be 50 percent, based on Dr. Cusick's testimony.

Claimant contends that the Award should be affirmed, or possibly modified to reflect that the claimant suffered two separate accidental injuries and should be awarded a 45 percent permanent partial impairment to the left lower extremity against Sandpiper and its carrier for the October 15, 2005 accident, and a 30 percent permanent partial impairment to the left lower extremity against Andover and its carrier for the November 4, 2006 accident. At oral argument claimant offered yet another alternative - suggesting the Board modify the Award to award a 12 percent to the whole body against Sandpiper for the October accident and a 75 percent to the whole body against Andover for the November accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

This claim has been before the Board on an earlier occasion and the factual background has remained primarily the same since that time. Accordingly, the Board adopts the statement of facts but not the conclusions of law set forth in the Board's March 25, 2008 preliminary hearing Order and will not unnecessarily repeat them herein. Highly summarized, claimant slipped and fell while working for Sandpiper as a certified nurses aide on October 15, 2005. She injured her left knee and required treatment including surgery to repair her torn meniscus.

Claimant returned to work and eventually went to work for Andover, performing the same duties. On November 4, 2006, while resting her knee which she maintains was painful, claimant got up and her left leg caught on a telephone cord. She immediately felt increased pain and was taken to the emergency room. Claimant was ultimately seen by Dr. Jansson. Claimant was treated conservatively and orthoscopic surgery was recommended, but claimant elected not to have that procedure. She ultimately had a complete knee replacement in February 2008.

As is sometimes the case in workers compensation cases, the parties deposed no less than four physicians as to the nature and extent of claimant's knee impairment as well as the causal connection of that impairment to either of her docketed claims. And as is sometimes the case, each physician expressed a different opinion both as to the ultimate impairment and as to its connection to the two separate events described above.

Dr. Daniel Prohaska was the physician that treated claimant beginning in January 2006. He diagnosed lateral compartment osteoarthritis, degenerative changes at the patellofemoral joint along with a tear of the medial meniscus. He performed an arthroscopy on February 13, 2006 and released claimant based on her purported normal range of motion and lack of pain complaints. He assigned a 2 percent impairment to the left lower leg at the level of the knee.[4]

Claimant returned to see Dr. Prohaska in June of 2006 complaining of swelling, pain and stiffness. According to Dr. Prohaska these are all to be expected when someone has experienced a torn meniscus and suffers from osteoarthritis. After examining her and identifying some tenderness at the lateral joint line, he gave her an injection.

Claimant again returned to see Dr. Prohaska after the event in November 2006 voicing many of the same complaints he heard in June. He opined that her condition "may have been exacerbated" since June.[5] Dr. Prohaska testified that the November 2006 event

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[4] Prohaska Depo. at 11; Ex. 2 (May 2, 2006 letter).

[5] *Id.* at 16.

aggravated claimant's underlying degenerative joint disease, at least temporarily.[6] He did not believe that claimant had sustained any significant injury in November 2006.

Dr. George Fluter examined claimant in May 2007 and initially diagnosed claimant with left knee internal derangement occurring in October 2005. Dr. Fluter assigned a 12 percent impairment as a result of the October 2005 accident. Claimant returned to see Dr. Fluter in September 2008, after her knee replacement. Based upon his subsequent examination and a review of the medical records he rated her impairment at 75 percent permanent impairment based upon what he perceived as a "poor" result of her replacement procedure.

Claimant was also evaluated by Dr. Kenneth Jansson, a board certified physician, who saw claimant after the November 2006 event. According to him, claimant did not have a normal knee at the time she tripped on the telephone cord and in fact, claimant was voicing ongoing complaints before the November 2006 event. He concluded that her ongoing knee complaints post-November 2006 were the natural and probable result of her original October 2005 accident.[7]

Dr. Robert Cusick, the physician, who performed the knee replacement procedure, testified that claimant's second accident in November 2006 caused claimant's arthritis to "cross the threshold"[8] and become a clinically significant problem. According to him, after the 2006 accident claimant was complaining of popping and pain in the knee and experienced her knee giving out occasionally. He believed her subjective complaints warranted a knee replacement. Following the procedure, he concluded claimant had a "fair" result and under the *Guides*, this warrants a 50 percent permanent impairment to the left lower extremity.

The ALJ summarized his finding as follows:

> This Court finds that the [c]laimant was injured out of and in the course of her employment with Sandpiper Bay Health & Retirement Center on October 15, 2005. Any injuries that she may have received on November [4,] 2006, while working for Andover Health Care, are simply a temporary aggravation. All benefits are assessed against Sandpiper Bay Health Care and their insurance company, Travelers Indemnity Company.[9]

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[6] *Id.* at 18-19.

[7] Jansson Depo. at 26-27.

[8] Cusick Depo. at 7.

[9] ALJ Award (June 1, 2009) at 7.

The Board has considered the plethora of medical evidence along with claimant's own recitation of her ongoing complaints and finds that the ALJ's Award should be modified.

As it relates to the October 2005 accident (Docket No. 1,032,650), the Board finds that it is more probably true than not that claimant's permanent impairment to her left knee is 2 percent. Dr. Prohaska was the treating physician and under these facts and circumstances, he appears to be in the best position to evaluate and rate claimant's impairment. It follows then that Sandpiper is responsible for the TTD and medical associated with this first accident and continuing, until November 4, 2006.

The more problematic issue is the effect of the November 2006 event. Andover stridently maintains that claimant had ongoing complaints to her knee and so the event with the telephone cord was nothing more than a temporary aggravation of the complaints she had been experiencing since her October 2005 accident. Andover goes so far as to argue that the November 2006 event did not constitute an accident. The Board disagrees.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[10] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[11] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[12] The existence, nature and extent of the disability of an injured workman is a question of fact.[13] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.[14] The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.[15] It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an

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[10] K.S.A. 2005 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[11] K.S.A. 2005 Supp. 44-501(a).

[12] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[13] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

[14] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[15] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

existing disease or intensifies the affliction.[16] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[17]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[18] Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.[19]

While it is true that claimant had not experienced a flawless recovery following her October 2005 accidental injury, that fact alone does not preclude a subsequent accidental injury. Under these facts it is clear that claimant did suffer an accidental injury when she tripped on the telephone cord. Claimant immediately felt increased pain, describing her condition as "way over" a 10 on the pain scale.[20] She had to be taken to the emergency room. And she never testified her pain returned to its pre-November 2006 level. Claimant was eventually referred to Dr. Jansson who recommended that she undergo another arthroscopic procedure. Claimant declined this treatment apparently because she believed she got no relief from the earlier procedure. She eventually found her way to Dr. Cusick who recommended and performed a knee replacement.

Under these facts and circumstances, the Board concludes that claimant not only suffered an accidental injury arising out of and in the course of her employment with Andover on November 4, 2006, she also sustained additional permanent impairment as a result of that accident. Claimant's condition was worse after catching her leg on the telephone cord. She required immediate treatment and her symptoms did not subside after that accident. As explained by one physician, her degenerative condition was so aggravated by this event that her arthritic condition became a clinically significant problem. Her condition so deteriorated that Dr. Cusick determined a knee replacement was necessary.

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[16] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[17] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

[18] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 *rev. denied* 249 Kan. 778 (1991).

[19] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[20] P.H. Trans. at 28; R.H. Trans. at 69-70.

Having concluded that claimant sustained a compensable accident, the Board is left to consider the nature and extent of claimant's impairment. As explained by the two physicians that rated claimant's knee post-replacement, her impairment rating is governed by the physician's view of her result. A "fair" result qualifies for a 50 percent impairment while a "poor" result generates a 75 percent impairment. The ALJ averaged the two ratings and assigned a 62.5 percent permanent partial impairment to the left lower extremity. After considering the physician's ratings, the Board finds that an average of the two recognizes claimant's less than optimum result in this matter. Accordingly, the 62.50 percent permanent partial impairment awarded by the ALJ is affirmed. However, consistent with the findings above, Andover and its carrier are responsible for that permanency and any and all medical bills and expenses associated with claimant's injury as of November 4, 2006. Sandpiper will be held responsible for the TTD and medical expenses associated with claimant's first accident and resulting treatment up to November 4, 2006.

Andover is entitled to a credit under K.S.A. 44-501(c)[21] for the 2 percent awarded in Docket No. 1,032,650. The balance of the Award is affirmed.

Finally, the Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant for approval by the Director.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated June 1, 2009, is modified as follows:

DOCKET NO. 1,032,650

The claimant is entitled to 21.71 weeks of temporary total disability compensation at the rate of $304.59 per week in the amount of $6,612.65 followed by 3.57 weeks of permanent partial disability compensation, at the rate of $304.59 per week, in the amount of $1,087.39 for a 2 percent loss of use of the leg, making a total award of $7,700.04, all of which is due and owing and ordered paid.

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[21] (c) The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Sandpiper and its carrier are responsible for claimant's medical expenses associated with her October 2005 accident up to November 4, 2006. Sandpiper and its carrier are also responsible for 50 percent of costs associated with the litigation of both these claims. Claimant is entitled to future medical expenses upon proper application.

DOCKET NO. 1,032,501

The claimant is entitled 121.00 weeks of permanent partial disability compensation, at the rate of $304.59 per week, in the amount of $36,855.39 for a 60.50 percent loss of use of the leg, making a total award of $36,855.39, all of which is due and owing and ordered paid.

Andover and its carrier are responsible for claimant's medical expenses associated with her October 2005 accident up to November 4, 2006. Andover and its carrier are also responsible for 50 percent of costs associated with the litigation of both these claims. Claimant is entitled to future medical benefits upon proper application.

IT IS SO ORDERED.

Dated this _____ day of October 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: E.L. Lee Kinch, Attorney for Claimant
Ali Marchant, Attorney for Sandpiper Bay and its Insurance Carrier
David Mosh, Attorney for Andover Health and its Insurance Carrier
John D. Clark, Administrative Law Judge